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CHARLES ELMORE

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

No. 425

PANAMA MAIL STEAMSHIP COMPANY
(a corporation),
Petitioner,

vs.

ERNESTINA ISABELLE VARGAS,
Respondent.

BRIEF FOR PETITIONER.

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I.

INTRODUCTION.

This case represents an appeal by a steamship company from a judgment against it in an action brought by a woman passenger, a native of Salvador, for alleged criminal assault by a Filipino steward. The woman never spoke of the alleged assault to anyone until four months after she claimed it occurred, and between that time and the time of her complaint the

woman was, when his boat was in port, on obviously friendly terms with him. Then she learned that she was to have a child and that the steward was married. She first had the steward arrested on a charge of rape, and then, when this charge was immediately thrown out by the United States Commissioner, she sued the Panama Mail Steamship Company for $50,000.

The Panama Mail Steamship Company found itself in a peculiar position. Not knowing anything about the claim until over four months from the date of the alleged attack, the Steamship Company could not make any investigation immediately after the claimed crime and was therefore barred from obtaining evidence invaluable in such cases. The man concerned was a married Filipino steward whose obvious inclination was to protect himself and not the company and to deny any relationship between him and the woman—both because he might personally have to support the child and because of possible action by his own wife. The action was heard before a court, the rulings of which clearly indicate that not only the court was greatly influenced by the natural indignation which the mere making of the charge arouses in some men, but also the court completely confused the position of the man in an assault, seduction or bastardy case and the position of the Steamship Company in this case. Had the court worked out a carefully considered opinion treating of the law and facts it would at once have recognized its error, and have perceived that even under the woman's story this was no case of rape. The court, however, without

writing an opinion or making a finding, three months after the trial gave a judgment against the Steamship Company for $10,000. On appeal the Circuit Court of Appeals in a two-page opinion practically washed its hands of the case by declaring that it was a decision of facts in which the upper court would not interfere.

This squalid affair has at least one merit. It brings to the attention of the United States Supreme Court what gross miscarriage of justice can be brought about where a District Court writes no opinion and where the Circuit Court of Appeal, resting upon such lack of an opinion, treats the mere judgment as a finding against the defendant by the lower court from testimony given before it on every issue of facts raised by the pleadings.

II.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 33 Fed. (2d) 894. It appears in the brief herein at page 29. No opinion was rendered by the District Court.

III.

JURISDICTION.

The jurisdiction of this court to issue a writ of certiorari and review the judgment is found in Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 938;

United States Code Annotated, Title 28 (Judicial Code and Judiciary) Section 347 (a). The date of the judgment sought to be reviewed is July 15, 1929, judgment having been entered by the Circuit Court of Appeals for the Ninth Circuit on that date, affirming a judgment of the United States District Court for the Northern District of California, in favor of Ernestina Isabelle Vargas, respondent, and against Panama Mail Steamship Company, petitioner. (Record, p. 299.) Panama Mail Steamship Company filed its petition for writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and brief in support thereof in this court on September 28, 1929, and said cause was, on said date, docketed by the clerk of this court as No. 425, October term, 1929. A writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit was granted by this court on October 21, 1929, 50 Sup. Ct. Rep. 40; 74 L. Ed. 43. The case, as will be hereinafter more fully shown, is one arising under the admiralty jurisdiction, the libel being *in personam* against a vessel owner for alleged criminal assault by an employee of the latter against a passenger on the high seas. (Record, p. 5.)

IV.

STATEMENT OF THE CASE.

An understanding of the case is best had from examination of the testimony of the three principal witnesses. These three witnesses were Ernestina Vargas, the woman involved and who was seeking to recover $50,000 from the Steamship Company, Jose

Blanco, the steward, who was quite obviously trying, primarily, to protect himself from any and all claims, and Angela Villavicencio. Angela Villavicencio was an absolutely independent witness. She was located in San Francisco, came under subpoena, and gave testimony unshaken in any particular. She occupied the second berth in Room No. 31, was there at the time when the claimed attack was alleged to have taken place and testified that nothing of the kind happened. The other witnesses were of minor importance. The libelant, Vargas, was the only witness who testified to the attack. Her brother, sister-in-law, and her brother's mother-in-law, were put on to testify that Blanco, who admittedly was most attentive to the Vargas family after the ship arrived in San Francisco, later displayed an interest in the child expected by Miss Vargas. Various witnesses for the vessel proved by testimony of records and otherwise that Angela Villavicencio occupied the second berth in Room No. 31 at the time in question. But the three principal witnesses were as stated.

The libelant, Vargas, testified: A native of Salvador, 24 years old, on Monday, October 10, 1927, at La Libertad, she boarded the S. S. "Ecuador" for San Francisco. (Vargas, 23, 27.) When boarding the steamer she met the second steward, Blanco. (Vargas, 28.) On Tuesday, October 11th, she went to her stateroom at about 9 P. M. (Vargas, 31.) About 6:30 A. M. on the following day, October 12th, she rose, unlocked her stateroom door, and lay down again.*

*The conflicting reasons given by her for unlocking the door are commented on elsewhere. See Brief pages 16 and 17.

(Vargas, 58.) Shortly after unlocking the door it was opened and in came Blanco. (Vargas, 59.) He offered to get her coffee but she refused it. (Vargas, 60.) Then he took her hand, talked to her, kissed her, and finally attacked her. (Vargas, 33, 60, 69.) She did not call out because it did not occur to her. (Vargas, 33.) Also she did not know who would come to her aid. (Vargas, 34.) Another reason she did not scream was because of the noise there is in the morning aboard ship—(that is the noise of other people)—she feared she might not be heard. (Vargas, 34.) She did not ring the electric bell, although there was one within reach from her berth. (Vargas, 70.) Neither alleged participant was injured or were their clothes torn. (Vargas, 69, 70.) After the attack she got up and went to breakfast (Vargas, 71) without complaining to the Captain about Blanco, or, in fact, ever saying anything to anyone about this alleged attack until four months afterwards. (Vargas, 74.) After the attack, on the way to San Francisco, Blanco wore her ring on his finger. (Vargas, 63, 68.) [Before United States Commissioner Krull the woman testified that she gave Blanco this ring to keep for her. (Vargas, 61.) Before the court she testified that he took it at the time of the alleged attack. (Vargas, 37.)] When the steamer arrived in San Francisco her brother, learning that Blanco had the ring, came to the steamer to get it. She introduced Blanco to her brother. (Vargas, 72.) Her brother had Blanco as a guest at his house for dinner, together with Ernestina Vargas and other relations (Vargas, 73) and Ernestina Vargas and her relatives went, as

Blanco's guests, to dinner at another time. (Vargas, 73.) When being entertained by and entertaining the Vargas family Blanco told Ernestina Vargas that he was not married. (Vargas, 73.) Blanco went to New York from San Francisco on the "Ecuador," but when he came back to San Francisco he brought various presents for the Vargas family. (Vargas, 78.) On this return trip he again had dinner with the libelant and her relatives. (Vargas, 78.) By the time Blanco came back again from another trip to New York libelant found she was to have a child (Vargas, 39). She then swore out a warrant and had Blanco arrested and taken to United States Commissioner Krull's office. (Vargas, 40, 53.)

On hearing her testimony on March 15, 1928, United States Commissioner Krull immediately threw out the case on the ground that it was not one of rape, although there was a possibility of a case of seduction with resulting rights against Blanco in the State Court. (Krull, 202.) On March 22, 1928, she filed the present suit for $50,000 against the Panama Mail Steamship Company. (Record, 5.)

Ralph Vargas testified:

He asked Blanco to his house for dinner. Blanco came and had dinner with his family, including the libelant. (R. Vargas, 112.) The next day he and his wife and the libelant dined with Blanco as his guests at the Mandarin Cafe. (R. Vargas, 112.) Everybody had a good time. (R. Vargas, 115.) Blanco used to telephone to the Vargas house. (R. Vargas, 115.) Blanco had two automobiles which he said he owned. (R. Vargas, 110.) He took the libelant and Ralph

Vargas riding twice. (R. Vargas, 110, 111.) Ralph Vargas understood that Blanco wanted to marry his sister. (R. Vargas, 115.) Then Blanco went off on his ship. When he came back from New York he brought presents. For Ralph Vargas he brought a pair of shoes, and for Mrs. Vargas a canary bird. (R. Vargas, 113.) Again Blanco came to dinner. (R. Vargas, 114.) Ralph Vargas gave Blanco a pillow in return and sold him two hats. (R. Vargas, 113, 119.) When the ship next came back from New York there was a dispute about the payment for these hats, and in the course of it Ralph Vargas learned that Blanco was married. (R. Vargas, 120.) At about the same time he learned that his sister expected a child. (R. Vargas, 107.) The next day they had Blanco arrested. (R. Vargas, 107.)

The testimony of Mrs. Ralph Vargas was to the same effect. She related the dinners, the presents, the automobile rides and a theater party. (M. Vargas, 152, 153.) And then she told of later discovering the condition of the libelant and that Blanco was married and that he had no money to give her. (M. Vargas, 147.)

These were the witnesses for the libelant. The other witnesses were of minor importance, except that they seemed to build up the evident theory of the court that if Blanco were the child's father, then the Panama Mail Steamship Company should pay the woman.

Examined on deposition the steward, Blanco, half Filipino, half Spanish, testified to little more than a formal acquaintance with Miss Vargas. He knew her

slightly, wished her "good morning" when she passed and never at any time had any relations with her. (Blanco, 211.) He testified of the various dinners referred to with the Vargas family, and of the various presents given by him as well as about the dispute regarding the hats. (Blanco, 211, 216.) He denied that he ever agreed to support the child or even that he had any interest in it. (Blanco, 221, 223.) It was just the kind of testimony that we might expect from an Oriental who wished to protect himself against any possible claim for the support of the child. He admitted nothing—to the Panama Mail Steamship Company or to anyone else.

The testimony of Angela Villavicencio seems absolutely conclusive that the whole story of the attack was absolutely false, first made up by the Vargas woman to excuse her condition—next used in an attempt to get revenge against Blanco for pretending to be a rich bachelor—and finally worked up in an effort to extract money from the Steamship Company.

Angela Villavicencio testified:

She came from Nicaragua on the S. S. "Ecuador." She first was in the second class, but owing to the fact that the only other woman in the second class left the ship, Miss Villavicencio was moved into the first class. (Villavicencio, 167, 168.) At La Libertad she was put into Stateroom No. 31 and occupied one berth. The other berth was occupied by Miss Vargas. She slept in Room No. 31 each night and rose only about the time of the breakfast bell. Blanco never was in the room and Miss Vargas never complained about him. (Villavicencio, 169, 173.)

No proof could be more conclusive than this testimony of this woman who had nothing to win or to lose by the outcome of the case. Yet the District Court seemed either to forget or ignore her testimony. Apparently that court, once it heard of this half-Oriental's pretending to be unmarried, decided to enter judgment and help the Vargas woman out. *The Villavicencio witness testified that no such attack was ever made.* This testimony that Angela Villavicencio occupied a berth in the stateroom at the time this attack was alleged to have been made was corroborated by the chief steward, the purser and the records of the company. (Lorenzen, 178, 179; Henry, 273; Mallory, 195.)

The trial was completed on September 14, 1928, and on December 15, 1928, without filing an opinion or making a single finding, the court simply entered judgment for $10,000 in favor of the libelant. The grounds on which the court acted are wholly unknown, and from the nature of the evidence that was introduced, and particularly from the character of the rulings which the court made, it is impossible to state whether the court had in mind seduction, or bastardy or some other similar charge. The nature of the evidence which the court allowed to be introduced, over objection of counsel for the respondent, showed clearly that the court completely confused the position of the Panama Mail Steamship Company and the position of Blanco, and that it evidently thought that if on any ground whatsoever any court might enter any judgment against Blanco then the Panama Mail Steamship Company should have a judgment entered against it.

V.

SPECIFICATION OF THE ERRORS RELIED ON.

The errors relied on are quite general except as to those concerning admissions of evidence. The failure to write any opinion or to make any findings in our opinion leaves this court completely unguided or controlled by any presumptions of any character, and makes the case one which should have been considered *de novo* by the Circuit Court of Appeals. In referring to the various specifications of error relating to the admissibility of evidence the petitioner primarily has as its purpose the emphasizing of what the District Court evidently had in mind during the trial of the case—the confusion of the position of the Panama Mail Steamship Company in the present action with the position of its steward Blanco, and treating him as if he were under trial for rape, seduction, bastardy, or some similar offense. The assignments of error relied on are:

First. If the court entered judgment on the ground of criminal assault or rape—and the court making no findings in any opinion or by a decree, left it entirely uncertain what his grounds were—the court erred because the facts show that there was neither rape nor criminal assault committed on the S. S. "Ecuador."

Second. If the court entered judgment on the ground of seduction—and the court making no findings in any opinion or by a decree, left it entirely uncertain what his grounds were—the court erred because the facts do not show seduction and the law does not allow recovery for seduction on the high seas against a corporation.

Third. If the court entered judgment on the ground of bastardy, the court erred because the law does not allow recovery for bastardy against a corporation.

Fourth. The court erred in not finding that no criminal assault or rape was committed on libelant on the S. S. "Ecuador."

Fifth. The court erred in the following particular:

Mr. Vargas testified that Mr. Shenick, a former port steward of the company, told him (Vargas) that Mr. Blanco told him (Shenick) that he (Blanco) would help in paying some of the expenses of Ernestina Vargas in connection with the expected baby.

The testimony was objected to as hearsay, and the court rules as follows:

> "The COURT. Was Blanco there with him?
> A. Yes, he was there.
> The COURT. All right, go ahead."

A long statement as to what Blanco said in regard to helping pay expenses of Miss Vargas was then admitted.

Sixth.* The court erred in the following particular:

Mrs. Emma Julian, mother-in-law of Ralph Vargas, testified through an interpreter that after the suit was brought, Blanco told her that he was sorry for what happened and that he would help pay for the child and that if the child was a boy he should be named after him, but if a girl, she should be named after Ernestina and that he would get a divorce.

Respondent objected to all this testimony as irrelevant on the ground that it had nothing to do with any claim against the Panama Mail Company.

The court overruled the objection.

The above testimony remained in the record.

Seventh.* The court erred in the following particular:

Mrs. Emma Julian under examination:

"Mr. HUTTON. Did Blanco on that occasion say that he would get a divorce from his wife, but he had not any case for divorce against her?

Mr. THACHER. I would like to object to that. Whatever that may be against Blanco, certainly it is not relevant against the Panama Mail.

The COURT. Overruled."

Mrs. Julian testified that Blanco so stated some months after the present suit was brought.

Eighth. The court erred in the following particular:

Mr. Mallory, Assistant General Manager of the Panama Mail Steamship Company, testified as to his familiarity with the S. S. "Ecuador" and with the construction of Room No. 31 (where libelant was alleged to have been assaulted) and with the open screen between that room and the alleyway.

"Mr. THACHER. Q. *What would be the effect of any unusual noise in Room 31?*

A. *It would be heard in the alleyway.*

---

*These assignments of error affecting admissibility of evidence while constituting, in our opinion, ground for reversal are primarily inserted to show the position of the lower court. These various alleged conversations of Blanco months after the alleged attack are hardly admissions in a case not against him. An agent cannot bind his employer by admissions or other statements unless statements are *res gestae* or "made in the course of his employment and within the scope of his authority." See such cases as *McLeod Lumber Co. v. Western Redwood Co.*, 8 Fed. (2nd 930), *Railroad Company v. O'Brien*, 119 U. S. 99; *Wicker v. Scott*, 29 Fed. (2nd) 807, 809; 22 *Cor. Juris* 377.

A small amount of such erroneously admitted evidence would not make any particular difference. The large quantity of such irrelevant and incompetent testimony in this case was probably responsible in part for the confusion of the court as to the exact question of law and fact involved.

MR. HUTTON. *I object to that on the ground it is calling for the opinion of the witness.*

THE COURT. *Sustained. I have not heard any testimony of any noise whatever."*

The testimony was thereupon excluded.

Ninth. The court erred in entering a decree against the Panama Mail Steamship Company in favor of the libelant, Ernestina Isabelle Vargas, in the sum of ten thousand ($10,000) dollars, together with interest and costs, or for any sum whatever.

Tenth. The court erred in entering a judgment which was excessive in the amount of damages awarded.**

VI.

ARGUMENT.

A.

VARIOUS EXTRACTS FROM TESTIMONY SHOW THE NATURE OF THIS CLAIM.

1. Testimony of libelant regarding the alleged assault.

The outline of the evidence has already been given. To save examination of the record and to bring out even more clearly the sordid character of this whole affair, a few extracts from the actual testimony will be given.

Of the events on the steamer the Vargas woman testified in part:

After describing her stateroom, No. 31, she testified:

"Q. Are there many rooms on that corridor?

**The extent to which the court went can be judged upon reading a note in 1917 E. Ann. Cas. 135 on the inadequacy or excessiveness of verdict in a civil action for rape. $5000 was the highest amount allowed in any reported case except in one case where an $8000 verdict was reduced to $3000.

A. Yes, there were rooms to the right and rooms to the left." (Vargas, 30.)

The stateroom was not at all isolated.

"Q. Now, on the second night out, that is, the night that you left this last port on the Central American coast, did you go to bed?
A. Yes.
Q. About what time?
A. I left my deck chair about nine P. M." (Vargas, 31.)

No seasickness compelled her to remain in her berth.

"Q. And the bell was right there where the person in the bed might reach it without getting up?
A. Yes, so that you could put your hand over your head and ring it." (Vargas, 55.)

From her berth she could thus get service at any time.

"Q. Did you lock the door every night that you occupied that stateroom?
A. Yes.
Q. And a person on the outside couldn't release that bolt?
A. No." (Vargas, 56.)

With the door locked she had absolute protection.

She testified that on October 12, 1927, between 6 and 6:30 A. M. she got up and unlocked the door.

"Q. Why did you open the door?

A. I thought I might be able to go out.

Q. Were you dressed?

A. No.

Q. Were you in the habit of opening the door before you got dressed?

A. I got up; I don't know why exactly that I opened the door, but I wasn't dressed, only in night clothes.

Q. What did you do after opening the door?

A. I went back and lay down again.

* * * * * * *

Q. All you did when you got up at 6 in the morning was to unlock the door and go back to bed?

A. Yes, that's all." (Vargas, 57, 58, 59.)

* * * * * * *

"A. I left the bed for the purpose of opening up the door, because, as I could not go upstairs to get coffee, I thought it was better to have it brought there." (Vargas, 31, 32.)

* * * * * * *

"Q. Did you ring for coffee?

A. No.

Q. Why didn't you ring for coffee if you wanted it?

A. Because it was not time yet."* (Vargas, 79.)

This evidence is characteristic: Caught in giving one patently untruthful reason she would promptly make up another.

"After you went back to bed, what happened?

A. The door opened, and this gentleman entered, and asked how I was.

Q. What time was that?

A. Probably 6:30 or 7 o'clock, I don't remember exactly." (Vargas, 59.)

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*After testifying freely about times she testified:
Q. Did you look at your watch at that time—
A. I did not have any watch.
Q. How did you know what time it was?
A. I did not know. (Vargas, 51.)

It was surely a strange coincidence that as soon as this Central American native unlocked her door at about 6:30 in walked the Filipino waiter. How did he know about it?

"Q. What was said then?
A. *He asked me if I wanted some coffee.*
Q. *And after that?*
A. *I said I wanted none.*" (Vargas, 60.)

On cross-examination she testified:

"Q. *If it was for the coffee, why didn't you accept the coffee that Blanco, when he first came into the room, offered to give you?*
A. *Because he offered to give me coffee, and I knew that a messboy would bring it, I did not want to accept any favors from him.*
Q. *Why didn't you want to accept any favors from him, if he was the second steward, and you never had a word with him, except going up the gangplank?*
A. *Up to that time I did not know he was second steward.**
Q. *But did you think that he was one when he came into the room?*
A. *Any employee of the vessel.*" (Vargas, 79, 80.)

She opened the door to get coffee. Without the bell being rung in came the waiter and offered it to her. She did not wish to take it because then she would be accepting a favor from him. However she didn't know who he was. Seemingly this story was the product of an unusually low order of intelligence.

We shall not quote at any length from her testimony about this alleged attack. On her own story it was no attack whatever. (See *Mills v. United States, infra.*) She related how he talked to her. "I was

*Yet Vargas at another time testified that when she went on board she asked the second steward, Blanco, for the number of her stateroom. (Vargas, 67.)

telling him if he did anything he would be afterwards sorry." (Vargas, 33.)

"Q. But you did not call out at any time?
A. No I only supplicated and entreated him to leave me alone." (Vargas, 88.)

There was no injury to anyone. From her own story Blanco must have been in talking to her for some considerable time. (Vargas, 32, 33, 69, 70, 88, 89.)

"Q. *Why didn't you call out?*
A. *In the first place I did not holler out, because it did not occur to me,* because I was afflicted with what was happening.
Q. *What do you mean by that?*
A. *Besides, I was telling him to leave me alone, to loosen his grip.*
Q. I asked you why you did not call out.
A. Because at that particular moment I did not have courage to cry out, and not knowing who would come to my aid, *and my voice might not have been heard, and on account of the noise that there is in the morning aboard ship, I did not think it was possible to be heard.*"
(Vargas, 33, 34.)

All this evidence makes the type of this claim perfectly clear. Here this woman was on shipboard at about breakfast time with the entire crew and passenger list of a large steamer within 400 feet. She had assistance at every hand. But she did not call for assistance because she did not think of it, or because she didn't know who would help her out (as if it would make any difference), or because of the noise in the morning on board ship (the noise of the crew and passengers getting out and around the decks).

To even the most credulous court which considered the evidence, the absolute protection had by the woman must have been apparent. The penalty for rape on shipboard is death. One loud scream would

have been heard everywhere on the vessel, started passengers and crew immediately investigating, terrorized Blanco, and Blanco would have raced out of that room with almost the speed of a bullet. But the woman did not call out. On her own story she did not want to call out.

"Q. Well, how long after he left did you get up?

A. I don't remember exactly how long it was, but I got up about 8 o'clock.

Q. *What did you do when you got up?*

A. *I went to breakfast.*

Q. *Did you tell anyone about this?*

A. *No; I said nothing to anybody.*" (Vargas, 71.)

The episode as related very evidently did not make much effect upon her.

2. Conflicts in testimony of libelant.

The barefaced perjury of the libelant in this case was absolutely proved in connection with certain testimony regarding a ring. This ring was given by the father of Ralph Vargas, in San Salvador, to Ernestina Vargas to be carried to San Francisco and given to Ralph Vargas. Admittedly, after he met Ernestina Vargas, Blanco received possession of this ring and wore it right along. Before the United States Commissioner the libelant, Vargas, testified that a few days after the alleged attack she gave the ring to Blanco to take care of and he wore it on his finger. At the trial, apparently realizing how preposterous her first story was, she testified that Blanco stole it. In both cases she was a sworn witness and in both cases her testimony was reported. There could have been no mistake. The stories were absolutely different. Either she gave perjured testimony before the

United States Commissioner or before the United States District Court. There is no alternative. To bring out the absolute perjury we give extracts from her testimony in parallel columns.

BEFORE UNITED STATES COMMISSIONER KRULL LIBELANT TESTIFIED ON MARCH 15, 1928.

"Q. As a matter of fact, didn't you go to him and give him some rings to keep for you?

A. Yes, he met me and spoke to me, asking if he could help me, *and I gave him a ring which was too big for me, to keep for me.*

Q. What day was that?

A. I don't remember what day it was.

Q. Was it before he came in on the 12th?

A. Yes.

Q. Or was it afterwards?

A. I think it was afterwards.

Q. How many days afterwards?

A. I don't remember how many days after.

Q. But it was one or two days after the 12th?

A. I don't know; I can't positively say.

Q. The truth is, that you had only one conversation with him before he entered your room, that being the one you testified to, when you walked up the gangplank?

A. Yes, only one.

Q. *And the conversation relating to the ring was after the episode on the 12th?*

A. *Yes, after the 12th.*

Q. And just what occurred at that time? Where was it that you met him and gave him the ring?

A. I met him on the stairway; I don't know whether he was going up or down, but he might have been just there.

BEFORE THE UNITED STATES DISTRICT COURT LIBELANT TESTIFIED ON SEPTEMBER 28, 1928.

"Q. Now, at the time that you were struggling with Blanco, and he was consummating what you say he consummated, did anything fall off of your finger?

A. Yes, a ring fell off, which he gathered.

Q. What do you mean by 'gathered,' picked it up?

A. Yes, gathered up—he got the ring from the floor, and he took it with him; and I don't know whether he wore it or not.

Q. Where did you get that ring?

A. I brought it with me, because my father was sending it to my brother."

(Vargas, 36, 37.)

* * * * *

"A. After the 12th he found me up on the stairs, and then it was when he told me that that ring was too big for me.

Q. Too big for whom?

A. Too big for me.

Q. That meant too big for you, or for Blanco?

A. That it was too big for me."

(Vargas, 64.)

* * * * *

BEFORE UNITED STATES COMMISSIONER KRULL LIBELANT TESTIFIED ON MARCH 15, 1928.

Q. And what happened?

A. Nothing more than that he asked me if he could serve me and I spoke of the ring.

Q. What did you say exactly?

A. *When he offered his services, I told him that I was bringing this ring to my brother, and asked him to take care of it for me.*

* * * * *

Q. *This time that you gave Jose Blanco Reyes on the stairway the ring was the first time that you saw him after the molesting of the morning of the 12th?*

A. *Yes.*

Q. That was the first time that you saw him after the 12th, the first conversation that you had with him?

A. Yes.

Q. He took the ring from you?

A. Yes.

Q. *Did he put it on his finger?*

A. *Yes.*

Q. *And did he give it back to you at the end of the trip?*

A. *Yes.*

Q. When?

A. The day I arrived at San Francisco.

Q. *And he wore the ring during all that time?*

A. *I think so; I saw it on him several times.*

Q. You never asked him for it during that time?

A. No, I never asked him to give it back."

(See Defendant's Exhibit C, and Vargas, 61, 62, 63, 64, 65, 66, 67, 68.)

BEFORE THE UNITED STATES DISTRICT COURT LIBELANT TESTIFIED ON SEPTEMBER 28, 1928.

"A. It was not for the purpose of giving him the ring; the only thing he told me was the ring was too big."

(Vargas, 66.)

* * * * *

"Q. *Did he put it on his finger?*

A. *Yes.*

Q. *And did he give it back to you at the end of the trip?*

A. *Yes.*

A. Yes, he gave it to me, but after I arrived with my brother to bring it, to get it back.

Q. When?

A. The day I arrived in San Francisco.

Q. *And he wore the ring during all that time?*

A. *I think so; I saw it on him several times.*

Q. *You never asked him for it during that time?*

A. *No, I never asked him to give it back."*

(Vargas, 68.)

3. Testimony of libelant's roommate.

The testimony of Angela Villavicencio could not be more conclusive. She testified:

"Q. *You know Ernestina Vargas, do you?*
A. *Yes, I know her.*
Q. *When did you first meet her?*
A. *At La Libertad.*
Q. *What were the circumstances of your meeting her?*
A. *Because we were room-mates together.*
Q. *In what room?*
A. *In 31.*
Q. How did you happen to become room-mates with Ernestina Vargas at La Libertad?
A. *Because my passage was second-class passage, and as there was no woman, no other woman passenger in the second-class passage,* as I was recommended by the priest at Corinto, Mr. Henry, they put me over to the first-class.
Q. *Where was that that you went into the first-class cabin?*
A. *At La Libertad.*
Q. What time at La Libertad did you go into room 31?
A. *About between 5 and 6 o'clock P. M. in the afternoon.*
Q. *While you were at La Libertad?*
A. *Yes, at La Libertad.*
Q. Did you meet Ernestina there when you came into the stateroom?
A. No, I did not meet her in the stateroom. We met on deck.
Q. Before you both went to bed that night?
A. Yes.
Q. *Which berth did you occupy?*
A. *The one that is nearest the door of the stateroom.*
Q. *You slept there every night?*
A. *Yes, every night until we arrived here.*
Q. You got up after the breakfast bell rang, or about that time?

A. Yes.

Q. And you used to talk to Ernestina on and off between the time you came into the room at La Libertad and the time you arrived at San Francisco?

A. Yes, we spoke.

Q. *Did she make any complaint about Blanco to you?*

A. *No.*" (Villavicencio, 167, 168, 169.)

"Q. You never saw a man in the room while you were there?

A. No." (Villavicencio, 173.)

4. Subsequent relations between libelant and accused steward on shore.

The friendly relations on shore between Blanco and the libelant and her family utterly discredit the story of the libelant. Extracts from testimony produced by libelant follow:

"A. When I got off the boat to meet my brother, I didn't have the ring, and I told my brother about it, and we went back to get the ring from Reyes (Blanco).

Q. What happened?

A. He gave me the ring.

Q. Did you present him to your brother?

A. *Yes, I introduced him at that time, and said that he had taken care of the ring for me.*

Q. And your brother shook hands with him?

A. Yes." (Vargas, 72.)

* * * * * * *

"Q. Now, what was that about going out to dinner? Who asked that?

A. Blanco asked us if we would go out to supper with him Saturday night, the following night, so I said no, and my husband said to him, 'You come out to the house to supper.'

Q. He went out to supper?

A. Yes.

Q. *How many times did Blanco call at your house—more than once?*

A. *Yes, more than once.*" (Mildred Vargas, 143.)

* * * * * * *

"Q. *Then you drove off, and the next day, as I understand it he came up to your house and had dinner?*

A. *Yes.*

Q. *And everything was quite agreeable?*

A. *Yes.*

Q. Was it the next day that you and your family went out on an automobile ride with him?

A. I believe it was the next day he took us in his machine to the Mandarin for dinner." (Mildred Vargas, 152.)

"Q. *After that you went to the theatre, and everything was agreeable, was it not?*

A. *Yes.*

Q. I mean there was no unpleasantness?

A. No." (Mildred Vargas, 152, 153.)

Miss Vargas had testified to the same effect.

"Q. And you went to the theatre after you had dinner, did you?

A. *Yes, we went to a theatre.*" (Vargas, 77.)

"Q. *Who went along riding with you?*

A. *The three of us went, and the last time we took Mrs. Julian out for a ride, the mother of my wife.*" (Ralph Vargas, 110.)

"Q. *He brought another car and took you for an automobile ride?*

A. *Yes.*" (Ralph Vargas, 112.)

"Q. *Did he have an automobile?*

A. *Yes, two automobiles.*" (Ralph Vargas, 110.)

He was very clearly regarded as a rich bachelor.

"Q. And then when he came back the next time he brought a canary and a pair of shoes as presents, did he?

A. I tell you about those pair of shoes; he was wearing those pair of shoes and I said to him, 'What kind of shoes are those?' and he said, 'I always get them from New York'; he asked for my size, he didn't say anything else, and then he brought a pair of shoes; besides that I had a cushion and I see he fall in love with that cushion and he said, 'What a beautiful cushion, I wish I had one so I could have it in my car,' so the next time I made it for him, because he asked me for it, when he brought this pair of shoes, I gave the pillow to him.

Q. You gave him a pillow for a pair of shoes?

A. Yes.

Q. He brought your wife a canary bird?

A. He didn't bring a canary for anybody. He said. 'I got a canary over here that I had for a long time, I want to give it away to somebody because I have no use for it.'

Q. Had your wife asked him for a parrot?

A. *My wife asked him for a parrot and he was going to bring it.*"

The presents were most appealing. As stated, however, the canary was not the parrot asked for.

"Q. Then it was the second time the ship was here you had him out to dinner again?

A. Yes, I think I asked him, I invited him to come up to dinner, and I believe he got there very late." (Mildred Vargas, 153.)

"Q. Your sister never said that she hated him, or anything of that kind?

A. *Well, she said that fellow was bothering her, and my wife told me that, she said that fellow, he wants to marry your sister.*" (Ralph Vargas, 115.)

This was the obvious foundation of this case. The Vargas family thought Blanco a rich and most eligible bachelor seeking to marry Ernestina.

Ralph Vargas and Blanco, however, on the next trip became involved over a $15 questioned bill for hats. At this time his marriage and his lack of means were learned of.

"Q. *You gave the hats to Blanco?*
A. *Yes.*
Q. Whereabouts did you give them to him?
A. Down at the ship.
* * * * * * *
Q. And those two hats were for Blanco?
A. Yes.
Q. Because Blanco said he wanted to have two hats for a present?
A. Yes. I gave them to him where the ladder is.
* * * * * * *
Q. What happened next?
A. Then he took me to the other side and he told me he ain't got enough money to pay me, and he was going to send me the money.
Q. How much were you going to charge him for the hats?
A. $15.
* * * * * * *
A. Then when he left we saw a Filipino boy come out with the same boxes, and I followed that boy, because I knew the boxes, I knew the hats, and this Filipino boy went outside, and I watched where these hats were going, and I asked where they were going, and they belonged to Blanco's wife.
Q. Did they say for whom they were?
A. *Yes, he said that they were for his wife.*
Q. *He said they were for Blanco's wife?*
A. *Yes."* (Ralph Vargas, 119, 120.)

Mrs. Ralph Vargas testified about hunting up Blanco after she learned of her sister's condition.

"A. * * * And he said, 'Well, I don't know what to do, I have been down at Panama trying

to find somebody that they said would give me a medicine for her that she could take for that, and I was not able to find him,' and he said, 'I suppose we will need money for that, I have not any money right now, but I will be able to find some,' and I said, 'Well, what about marrying, can't you marry?' I was afraid my husband might find out, and he might do something rash, that was all I was afraid of. He said, 'I can't marry her now because I have a very important engagement.' I said, 'What can it be, are you married?' And he said, 'Yes, I am married, and I have some children.'" (Mildred Vargas, 147.)*

According to the story of Mr. and Mrs. Vargas they had every reason to feel angry at Blanco. Instead of the rich suitor expected to marry Ernestina he turned out to be married with children, and Ernestina expecting a child. It was natural that they felt angry toward him—but the Panama Mail Steamship Company had nothing to do with his posing as a rich bachelor.

5. Testimony of United States Commissioner regarding hearing before him.

As a conclusion of these extracts the testimony of United States Commissioner Krull is of interest.

He testified:

"Q. Mr. Krull, you were the United States Commissioner before whom the charges against

*The testimony of Mrs. Ralph Vargas is of interest in this. She testified of her conversation with Blanco. "He told me that in Panama he was looking for somebody, that he was intending to get a medicine for me, and he was unable to find that party." (Mrs. Ralph Vargas, 146.)

If the testimony of Mrs. Vargas is to be believed, in spite of the statements to the contrary of Ernestina Vargas and of Blanco, Blanco knew all about the condition of Ernestina Vargas long before his ship arrived in San Francisco in March, 1928. Ernestina Vargas must have and undoubtedly did write or tell him of her condition. They were obvicualy friendly. It was only when her family discovered her condition that she invented this "vis major" story.

this man Blanco were brought last March by Miss Vargas?

A. Yes, March 15, there was a complaint by Ernestina Vargas charging Jose Blanco Reyes with an assault under Section 278 of the Criminal Code, that is, he was charged with rape on the high seas on board the steamer 'Ecuador,' committed on or about October 12, 1927.

Q. What was the disposition of the case?

A. The charge of rape was dismissed.

* * * * * * *

Q. What was the conversation, if any, if you remember?

A. There was considerable conversation. The United States Attorney was present at this hearing, and went into the case quite in detail, and after I *determined that there was not a case of rape,* I suggested that there was a possibility of a case of seduction, and then a conversation ensued between the United States Attorney and the parties there, and the United States Attorney suggested that the plaintiff might pursue her remedy in the state court.

* * * * * * *

Q. What is the exact entry in your book?

A. The exact entry is *'after a detailed and full hearing the evidence is not sufficient to warrant a holding on the charge of rape,* and the case is accordingly dismissed and the defendant discharged for this particular offense.' Then there is a note here, 'U. S. Attorney suggested that the complainant make complaint to the state court on account of her condition.' " (Krull, 201, 202, 203.)

On cross-examination United States Commissioner Krull testified:

"Q. The only doubt you had in your mind was whether it was rape or whether it was seduction?

A. *Well, I did not have any doubt as to the rape charge."* (Krull, 205.)

B.

THE OPINION OF THE CIRCUIT COURT OF APPEALS SHOWS THAT THAT COURT DID NOT GIVE DUE CONSIDERATION TO THE LAW AND FACTS INVOLVED.

The opinion of the Circuit Court of Appeals is very short. Except for the purely formal part of it the opinion reads:

> "The utmost that can be claimed by the appellant is that the adverse decree is based on conflicting testimony taken largely in open court. Only two witnesses, the appellee and the steward, gave direct testimony concerning the alleged assault. The testimony of the appellee fully supported the charge, and that of the steward denies it in toto. The appellant contends, however, that the testimony of the appellee should be rejected because she made no outcry at the time and did not complain of the outrage committed against her for a period of some five months, or until she discovered that she was pregnant. A number of criminal cases have been cited in support of this view, but whatever the rule may be in such cases we think it is well settled that in civil cases no such strict rule obtains, and that the credibility of the complaining party is for the court or jury, in view of all the surrounding circumstances. Deah v. Raples, 39 N. E. 952; Linville v. Green, 102 S. W. 67; Schenk v. Dunkelow, 37 N. W. 886; Kramer v. Weigand, 135 N. W. 230; Jensen v. Lawrence, 94 Wash. 148.
>
> "The court below, after hearing the testimony of the appellee, together with her reasons for not making an outcry and for not sooner complaining of the outrage, gave credence to her story, and it it is not for us to say that the court erred in so doing. For if the case made by the appellee was not entirely free from suspicion, the defense itself was weak. The brief of the appellant practically concedes that the steward had sexual intercourse with this passenger, claiming that it was voluntary, but if no such concession was made, the

overwhelming weight of the testimony clearly establishes the fact. And from that fact, two conclusions follow. First, that the chief witness for the appellant was guilty of false swearing, and, second, that the girl who occupied the stateroom with the appellee during the greater part of the voyage was not present when the outrage was committed. Without attempting to further review the details of the testimony, from which no good can result, we deem it sufficient to say that this case belongs to that class where appellate courts refuse to review decisions of trial courts based on conflicting testimony taken before them, unless the record discloses some plain error of fact, or unless there is a misapplication of some rule of law.

"The appellee contends that the decree was less than it should have been, but we find no abuse of discretion in that regard.

"The decree is affirmed, with interest from its date, and for costs in this court."

It will be seen that the court hastily thought the case was one of facts and gave it very little attention after thinking of it in that light. Had the court not been so busy and had it, as a result, given the case careful consideration it would have realized that it was not a case merely involving a decision of facts and it would have also realized that the conflicting testimony rule did not apply.

The complete error into which the court fell is manifest from the opening sentence reading:

"The utmost that can be claimed by the appellant is that the adverse decree is based on conflicting testimony taken largely in open court."

As the law and the facts already make clear, such a statement shows a misconception of the matter. In

the first place, under the law of the *Mills v. United States (infra)* opinion, and other decisions cited, the woman never testified to a case of rape. As a matter of law it was not rape nor anything like it. Her testimony immediately opened up the question of law as to whether a woman who is attacked when there is assistance at every hand, but who, for her own reasons, saw fit not to call out, can be held to be criminally assaulted. The courts have uniformly held that it is the duty of the woman to use every means possible for defending herself, including her most effective weapon of screaming, and that if she does not resist to the maximum she has not been criminally assaulted. Upon the testimony of the Vargas woman alone the question is immediately opened up as to whether, under the cases, this could be considered in any respect a criminal assault. This question was never passed on. The facts as constituting rape in view of the cases presents an immediate question of law.

So far as conflicting testimony taken largely in open court is concerned, it must be remembered that the Vargas woman testified in open court, but that the steward Blanco testified on deposition. It cannot, in any sense, be viewed as a case where both witnesses testified in open court because they did not so testify.

But the opinion then goes on to state:

> "Only two witnesses, the appellee and the steward, gave direct testimony concerning the alleged assault. The testimony of the appellee fully supported the charge, and that of the steward denies it in toto. The appellant contends, however, that the testimony of the appellee should be rejected because she made no outcry at the time and did

> not complain of the outrage committed against her for a period of some five months, or until she discovered that she was pregnant."

We do not state that the testimony should be in all respects rejected because the woman admittedly made no outcry. But we do say that if the woman made no outcry when the evidence shows clearly that assistance was at hand, then the crime is not, under the decision of the United States Supreme Court, rape. Regarding her concealment of the alleged attack, that is another matter. We state that under the law, as we have already cited it, if a woman conceals an injury of this character for any considerable time such a circumstance is very strong evidence that her testimony is false, and this is the law of rape. The cases cited by the Circuit Court of Appeals in connection with the failure to call out we will deal with shortly. They do not in any way affect the law as the Supreme Court stated it in the *Mills* case *(infra)* and as it is generally recognized.

The Circuit Court of Appeals stated:

> "The court below, after hearing the testimony of the appellee, together with her reasons for not making an outcry and for not sooner complaining of the outrage, gave credence to her story, and it is not for us to say that the court erred in so doing."

This sentence refusing to consider the facts is in absolute harmony with the conclusion of the opinion in which it is stated:

> "Without attempting to further review the details of the testimony, from which no good can

result, we deem it sufficient to say that this case belongs to that class where appellate courts refuse to review decisions of trial courts based on conflicting testimony taken before them, unless the record discloses some plain error of fact, or unless there is a misapplication of some rule of law."

These two sentences show the clear basis of the opinion of the upper court. It thought that there were facts in the record and although the question submitted was largely a question of mixed law and facts the upper court refused to consider the matter because the lower court had made a decision. It was not that the lower court had entered a finding because there was no finding. It was merely because the lower court had decided the case at all that the upper court refused to even consider the facts although the questions presented were of mixed fact and law. Very clearly the upper court simply shut its mind after it made out that the basis of the claim was a charge of rape.

The opinion states:

"For if the case made by the appellee was not entirely free from suspicion, the defense itself was weak. The brief of the appellant practically concedes that the steward had sexual intercourse with this passenger, claiming that it was voluntary, but if no such concession was made, the overwhelming weight of the testimony clearly establishes the fact. And from that fact, two conclusions follow. First, that the chief witness for the appellant was guilty of false swearing, and, second, that the girl who occupied the stateroom with the appellee during the greater part of the voyage was not present when the outrage was committed."

The upper court misunderstood the brief of the petitioner if it thought there was any concession of the relations between the Vargas woman and this Filipino. We take the position now, and we have always taken the position, that we do not know anything about it. Oriental waiters are rather a low class, as anyone knows who has employed them. What Chinamen or Japanese or Filipinos do when they are not actually waiting on table or looking after a house is something which few employers know. Their idea of the relation of the sexes is as different from the American idea as is possible. They are an entirely different race of people. The fact that this Filipino waiter was ingratiating himself with the family of this libellant, Vargas, indicated that he had some motive, and an obvious motive would be possible relation with this woman, Ernestina Vargas. We think it probable that this Filipino waiter was giving these various presents to the libellant's family because of his concealed relations with this woman.* It is all a

*Our suspicions were practically confirmed when libelant Vargas testified to receiving from libelant in December, 1927—two months after the alleged attack—a card (introduced for identification) reading:

IT IS CHRISTMAS AND I WISH
YOU HAPPINESS SWEETHEART

CHRISTMAS GREETINGS
SWEETHEART

A happier Christmastide than this
I've never known before,
No other season's brought such cheer
Or held such gifts in store.

And all because each future hour
This merry season through
Is golden bright indeed sweetheart
With tender thoughts of you.

Your Loving
Blanco.

(Vargas, 48.)

This card proved to us that Blanco and the Vargas woman were on most friendly terms.

matter of surmise because both the woman and the waiter deny it. So far as our opinion of the libellant is concerned, and what she may have done, it is simply based on the fact that in our experience even semi-white women who consort with orientals are of a very low class. Throughout this case we consistently but unsuccessfuly endeavored to point out to the District Court that the paternity of this child cannot be the turning point on which the case should be decided. The only question is whether on the date in question this Filipino steward attacked this woman.

The conclusions which the Circuit Court of Appeals draws are proof that the case received very small consideration in the Appellate Court. The statement of the court that if the steward had relations with this passenger then the steward "was guilty of false swearing" is perfectly obvious. We do not deny that this steward is guilty of false swearing. The Panama Mail Steamship Company when sued, was, of course, absolutely in the hands of the two parties, the man Blanco and the woman Vargas. It was caught between a Filipino and a Central American native to whom a Filipino was a social equal. It had no other means to check up the story. An immediate investigation at the time of the offense would have shown definitely whether the woman was telling the truth or not. Because the woman waited for nearly five months the Panama Mail Steamship Company was largely in the hands of this Filipino steward Blanco. Blanco denied that he ever had anything to do with the woman at all, with the exception of the various entertainments after the ship arrived in port. He is a Filipino and from

the testimony in this case we think that he lied to us. Anyone having experience with certain lower classes of these orientals knows that very rarely do they tell the truth. We do not condemn all Filipinos, but anyone who has lived on the West Coast, or had these Filipinos as household servants, knows that certain classes are anything but truthful; that they tell all kinds of stories; that they are not honest like the Chinese, and that they have many faults. In spite of this fact they are frequently employed as servants on the West Coast by individuals in their homes and also by companies as waiters, because it is difficult to obtain anyone else. We will freely admit that this witness probably did not tell the truth to us or to anyone else. But the fact that a Filipino waiter from whom little can be expected in the way of integrity happened to be the Panama Mail Steamship Company's witness, cannot condemn the Panama Mail Steamship Company. In this connection it may be said that while a low class of Filipinos frequently include liars and sneaks and thieves, it is very seldom that they commit, against white persons, crimes of any great violence such as murder or highway robbery or assault. They are a different class of people from the gangster type prevalent in certain cities.

The principal deduction made by the court is, however, that the paternity of the child by this waiter proved "that the girl who occupied the stateroom with the appellee during the greater part of the voyage was not present when the outrage was committed." Such a conclusion obviously does not follow.

Proof that Blanco was the father of the child, even if made, is certainly not proof that Blanco assaulted the child's mother. Yet that is the effect of this statement of the Circuit Court of Appeals. The conclusion is even stronger. It is that if Blanco was the child's father then such fatherhood proves that the mother was criminally assaulted at a particular time and in a particular stateroom. That is the conclusion on which this judgment was affirmed in the upper court. The conclusion shows one thing. It shows that the upper court, in the crush of business now being dispatched by that court, in promptly getting its work out did not work out the facts or the law and that the court was under an erroneous impression regarding both.

The cases cited by the Circuit Court of Appeals relative to the rule in civil cases regarding the necessity for calling out or for complaining are, in our opinion, of a kind entirely different from the case at issue. They, of course, all concern cases which were brought against the actual perpetrator of the crime and none of them deal with cases where the employer is sued. Certain of the cases are not rape cases at all, but are merely assault and battery cases—a class of case which is naturally regarded as much less serious at law and which carries much less damages than an actual rape case.

In *Dean v. Raplee* (N. Y.), 39 N. E. 952, a 14-year-old child, an orphan, was taken into the house of the defendant under an arrangement by which he was to board, clothe and educate her. The young girl was

totally inexperienced, threatened by this defendant to whom, as an orphan, she had been turned over, and was obviously, because of her "extreme youth, inexperience, and dependence united with the principle of fear and obedience," terrified of her custodian. The court laid great stress on the fact of her youth and on the fact that "consent or nonresistance on the part of a girl of that age was not to be understood in the same way as in the case of like acts committed upon a woman of more mature years." On a divided court, three to two, in which Judge Peckham, later Mr. Justice Peckham, of the United States Supreme Court, and Judge Edward T. Bartlett dissented, the judgment was unheld.

A case more different from the present action can hardly be imagined. In this case the woman was 24 years old, and far from being in the custody of the defendant, she was like any other passenger on board the ship, and she was a member of her brother's family in San Francisco for months before she saw fit to mention the alleged attack.

In *Jensen v. Lawrence,* 94 Wash. 148, 162 Pac. 40, the court specifically charged:

> "You are instructed that if at the time of the alleged assault, or within a reasonable time thereafter, the plaintiff did not make an outcry, and that she did not do so as soon thereafter as opportunity offered itself, unless she was prevented from making such outcry by fear and threats, plaintiff would not be entitled to recover; * * *"

This instruction is the unquestioned law and it is the law which was not applied in the present case.

The libelant, Vargas, did not make any outcry and she did not make any complaint for months. There was no fear connected with her case, since obviously this waiter was not in a position to harm her. If a sufficient reason for not making a complaint is that such complaint is always unpleasant to the party making it, then no such complaint need ever be made in a case of rape until the actual accusation is made.

In *Linville v. Green* (Mo. App.) 102 S. W. 67, a $3000 judgment for assault and battery on a 19-year-old girl by a 45-year old man was affirmed. The court, dealing with the question of the calling out by the woman stated that this was not necessary in the case under consideration because the attack was so far off that the woman could not be heard. Referring to the general law of the situation the court, in the course of its opinion, said:

> "In Robinson v. Musser, 78 Mo. 153, the woman, who sleeping in bed with a daughter of her alleged assailant, permitted him, while she was awake, to lift her from the bed and carry her to another part of the house, without making any outcry. She said she did this because she thought it would create a great scandal, and she felt that she was mistress of the situation. Enough of an outcry to awaken the daughter would have saved her honor, and the Supreme Court very properly thought she was far too complacent and considerate for her own good. And in another case (Champagne v. Haney, 189 Mo. 709, 88 S. W. 92), the prosecuting witness permitted herself to be 'ravished' while people were awake in an adjoining house 90 feet away, who could easily have been alarmed had she screamed. In that case the Supreme Court would not permit the charge of rape to stand. But, where the encounter occurs in an isolated place, without any

likelihood that an outcry, however vigorous, will bring relief, we do not perceive why a woman thus assailed should scream, though, perhaps, it would be a very natural thing for her to do. For practical purposes, she would better save her breath for the physical struggle."

In the case here under consideration there were probably 300 people, including the crew, within a distance of 500 feet of where this alleged attack was going on. One scream by the Vargas woman would undoubtedly have been heard over a great part of the ship and would have been immediately investigated. Furthermore, any such scream would have obviously terrified this steward in case he was making any attack. For a member of a crew to be found attacking a passenger on shipboard is punishable by years in the penitentiary, and for this waiter to have made an attack when anyone was apt to respond to the screams of the woman would have been unthinkable and the act of a clearly insane person. But the libelant, Vargas, stated that she did not call out because she did not think of it and because she did not know just who would come to her assistance.

In *Kramer v. Weigand,* Mo. 135 N. W. 230, the court upheld a $5000 judgment for assault and battery on a woman. The facts are not entirely clear, but it appears that the plaintiff was living at the home of the defendant and did not tell anyone about the assault for several weeks. It seems purely an assault case under different circumstances.

Schenk v. Dunkelow, 37 N. W. 886, was an action in which a judgment for $1500 for trespass to the

plaintiff's person which resulted in the birth of a child, was affirmed. The time of delay of the woman in making the complaint and the actual facts of the case do not appear.

It is submitted that these cases are cases which do not in any way change the law as set out in the *Mills* case *(infra)* or set out generally as applying to rape. The fact remains that it is a charge most easy to make and very difficult to rebut. This applies with overwhelming force to the case of some person who is sued for an alleged criminal assault committed by his Filipino servant five months before. It becomes extraordinarily difficult for the defendant to disprove the charge. This is because the defendant personally has no actual knowledge and must largely depend on what such a Filipino steward chooses to tell him.

Had the Circuit Court of Appeals gone into the facts and law of the case as a case de novo, or had it carefully considered the facts in their relation to the law set out in *Mills v. United States* (*infra*), or similar cases, and had it not practically refused to review the matter because of the decree of the court below, we are convinced that the decision would have been entirely different.

C.

THE LAW OF RAPE AFFECTING THIS CASE.

It is advisable here to consider the law. How little the law was considered in the District Court was

shown by the refusal of the lower court to allow the Steamship Company to prove that a scream in room No. 31 would have been heard all over the ship. (See Assignment of Error Eight, page 13.) Fortunately a leading case on the subject has been decided by the United States Supreme Court in *Mills v. United States,* 164 U. S. 644. This case was not referred to in its opinion by the Circuit Court of Appeals and the rulings and decision indicate clearly that its context was not in the mind of the District Court. The various elements which must be present before any such crime can be made out against a defendant will be dealt with serially.

1. Owing to the ease with which accusations of rape are made the courts require the strictest proof. Great caution is exercised by the courts and the entry of a judgment on the testimony of the complainant alone with circumstances tending to discredit her has been termed "a blot upon jurisprudence."

As was said by the Supreme Court of the United States in *Mills v. United States* (*supra*):

> "The crime itself is one of the most detestable and abominable that can be committed, yet a charge of that nature is also one which *all judges have recognized as easy to be made and hard to be defended against;** and it has been said that *very great caution is requisite upon all trials for this crime, in order that the natural indignation*** *of*

*If it is hard for a man to defend against this class of case against himself, one may consider the impossible position of an employer suddenly sued for the alleged dereliction of an Oriental employee five months before.

**As the Court recognizes, in a matter of this kind, the "natural indignation" aroused by the "mere charge" is insufficient to condemn. Without an opinion it is impossible to state the basis of the judgment. The rulings indicate that the mere charge was sufficient to cause the Court to ignore the general law on the subject, the discrediting circumstances testified to by the Vargas woman, the testimony of Angela Villavicencio, and to enter a judgment for $10,000 without an opinion or a finding.

men which is aroused against the perpetrator of such an outrage upon a defenseless woman may not be misdirected, and *the mere charge taken for proper proof of the crime* on the part of the person on trial."*

This statement of Mr. Justice Peckham is almost a repetition of the statement of Judge Hale 150 years previously when he said:

"It is true rape is a most detestable crime and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved and hard to be defended by the party accused though he be ever so innocent."

The result of the fact that the charge can be readily brought has resulted in certain proof being demanded before any defendant will be condemned for this crime. As Blackstone wrote:

"If she concealed the injury for any considerable time after she had opportunity to complain; *if* the place where the act was alleged to be committed was where it was possible she might have been heard and *she made no outcry; these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned."*

(*Blackstone,* Vol. 4, Sec. 212.)

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*The reaction upon certain persons of an accusation of this type of offense is well brought out in a recent work by Professor John Rathbone Oliver, an eminent psychiatrist of Baltimore, Maryland. In a volume entitled "Four Square," published by the MacMillan Company in 1929, at page 135, he writes:

"In one year, for example, in cases of sexual assault, the juries will find men guilty on the flimsiest evidence, and there seems to be a determination in that composit mind to send to prison anyone who is even accused of this one particular offense. Two years later, a similar cross section, again representing the same community, will do exactly the opposite thing. And the State's Attorney wrings his hands in despair, because, in a case of sexual assault, he doesn't seem able to get a conviction, no matter how strong his evidence may be."

The law is so elementary that even articles for the general public recognizes it. As is stated in the *International Encyclopedia,* Vol. 18, page 550:

> "One of the important circumstances attending the crime of rape is the mode of proof and in this respect it differs from other crimes. It is held to be all but essential as a corroboration of a woman's testimony that if her cries of resistance were not heard at all events she should have immediately after the offense complained on the first opportunity to her friends or relatives."

The California Law covers the situation in *Lind v. Closs,* 88 Cal. 6, 13. This was an action for damages for alleged rape. The court, in reversing the judgment of the lower court, said:

> " 'It has been several times held in this state, where the accused parties have been convicted of rape on the *testimony of the complainant alone, and under circumstances tending to throw discredit upon her testimony,* that the judgments should be reversed, the court saying that "a *conviction upon such evidence would be a blot upon the jurisprudence of the country, and a libel upon jury trials,*" and that "the ends of justice demand that the cause shall be tried anew." (People v. Benson, 6 Cal. 221; 65 Am. Dec. 506; People v. Hamilton, 46 Cal. 540; People v. Brown, 47 Cal. 447; People v. Ardaga, 51 Cal. 371.)
>
> " 'We think these cases in point here, and that the ends of justice require that this case be tried anew.
>
> " 'We therefore advise that the judgment and order be reversed, and the cause remanded for a new trial.' "

It is essential for the safety of the general public that the courts require substantiating evidence in suits based on alleged attack upon women. As the Califor-

nia Supreme Court said in *People v. Benson,* 6 Cal. 221, 223:

> *"There is no class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice* and private vengeance. In such cases the accused is almost defenseless, and Courts, in view of the facility with which charges of this character may be invented and maintained, have been strict in laying down the rule which should govern the jury in their finding."

2. The utmost resistance is required.

To warrant a holding of rape it must be shown that resistance was to the utmost. Mere non-consent is not enough. The law is elementary and it was emphatically stated in *Mills v. United States (supra).* In that case, discussing the obvious error of an Arkansas judge, the court said of his erroneous charge.

> "But the charge in question carried much more extensive ground. It covered the case where no threats were made; where no active resistance was overcome; where the woman was not unconscious, but where there was simply non-consent on her part and no real resistance whatever. Such non-consent as that is no more than a mere lack of acquiescence and is not enough to constitute the crime of rape." (164 U. S. at 648.)

No language could be more pertinent than this. The Vargas woman testified:

> "I was telling him if he did anything to me he would be afterwards sorry. He would not say anything when I was struggling, he would not use many words, but he would repeat that he liked me, and he liked me. As I was only in my nightgown, he finally was able to overcome me." (Vargas, 33.)

The testimony of Angela Villavicencio showed that not a word of this was true. The Vargas woman's later actions show that it was untrue. But granting that it was true—it was in no way rape. There was not a blow struck, nor a scratch, nor the slightest scream. The case was, on the woman's own story a mere matter of lack of acquiescence within the four corners of the *Mills v. United States* (*supra*) opinion, and in no degree the crime of rape. But the lower courts absolutely ignored this ruling case and this obviously controlling opinion of the United States Supreme Court.

And as was said in *Mills v. United States* (*supra*) at pages 644, 648, 649:

> "The mere non-consent of a female to intercourse where she is in possession of her natural, mental, and physical powers, is not overcome by numbers or terrified by threats, or in such place and position that resistance would be useless, does not constitute the crime of rape on the part of the man * * *
>
> "Bishop in his treatise on Criminal Law says that the proposition as to the element of consent, deducible from the authorities, is that although the crime is completed where the connection takes place without the consent of the female, yet in the ordinary case where the woman is awake, of mature years, of sound mind and not in fear, a failure to oppose the carnal act is consent; and *though she object verbally, if she make no outcry and no resistance, she by her conduct consents, and the act is not rape* in the man. 2 Bishop, Crim. Law, S 1122. This is consistent, we think, with most of the authorities on the subject. See People v. Dohring, 59 N. Y. 374 (17 Am. Rep. 349), and cases there cited. In the New York case it was held, after an examination and review of

the cases, that if the woman at the time was conscious, had the possession of her natural, mental, and physical powers, was not overcome by numbers or terrified by threats, or in such place and position that resistance would have been useless, it must also be made to appear that she did resist to the extent of her ability at the time and under the circumstances."

In *People v. Dohring,* 59 N. Y. 374 (referred to), the court said in part:

> "It is an extreme which they put, that shall be no excuse. So in Viner it is laid down, that *a woman cannot be ravished by one man without some extraordinary circumstances of force.* 18 Viner's Ab. 155, Rape, pl. 11. In The People v. Abbott, 19 Wend. 192, Cowen, J., says: 'Any fact tending to the inference that there was not the utmost reluctance and the utmost resistance, is always received.'"

As stated in *Oleson v. State,* 11 Neb. 276, the court said:

> * * * "The prosecutrix, if she was the weaker party, was bound to resist to the utmost. Nature had given her hands and feet *with which she could kick and strike, teeth to bite, and a voice to cry out; all these should have been put in requisition in defense of her chastity.*"

See:

Conners v. State, 47 Wis. 523;

Whittaker v. State, 50 Wis. 518; 36 Am. Rep. 856.

There seems little point in cumulating these cases. They are of the type of *State v. Cowing,* 99 Minn. 123. The court, in its opinion, said among other things:

"* * * there is no specific act of resistance testified to. * * * She does not say that she employed the instinctive devices of self-defense; * * * Neither the victim nor the perpetrator appear to have borne any bruise or mark resulting from the struggle.

* * * * * * *

* * * Under ordinary circumstances it is the duty of the woman injured in this way, or of her friends, to obtain prompt medical advice; and the omission to do so, in cases of alleged rape, is a fact which subjects the prosecutrix to discredit. 1 Whart. on Crim. Law (10th ed.), S. 565. That there was no indication of violence is a strong circumstance of defense. * * * In State v. Burgdorf, 53 Mo. 67, it is said: *'It certainly must have been a very amicable struggle which would inflict no bruises on the girl.'* "

See general note on the subject in 9 *Ann. Cas.* 572.

And in *Brown v. State,* 127 Wis. 193; 7 Ann. Cas. 258, the court said in part:

"We need not reiterate those considerations of the ease of assertion of the forcible accomplishment of the sexual act, with impossibility of defense save by direct denial, *or of the proneness of the woman, when she finds the fact of her disgrace discovered or likely of discovery, to minimize her fault by asserting vis major,* which have led courts, and none more strenuously than this, to hold to a very strict rule of proof in such cases. * * * Not only must there be entire absence of medical consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated. * * * Turning to the testimony of prosecutrix, we find it limited to the general statement, often repeated, that she tried as hard as she could to get away. Except for one demand, when first seized, to 'let

me go,' and inarticulate screams, she mentions no verbal protests.

* * * * * * *

A woman's means of protection are not limited to that, but she is equipped to interpose most effective obstacles by means of hands and limbs and pelvic muscles. Indeed, medical writers insist that these obstacles are practically insuperable in absence of more than the usual relative disproportion of age and strength between man and woman, though no such impossibility is recognized as a rule of law. 3 Wharton & S. Med. Jr., Secs. 172, 188, and authorities cited; 1 Beck. Med. Jr. 203. In addition to the interposition of such obstacles is the ability and tendency of reprisal, of counter physical attack. It is hardly within range of reason that a man should come out of so desperate an encounter as the determined normal woman would make necessary, without signs thereof upon his face, hands, or clothing. Yet this prosecutrix, of at least fair intelligence, education, and ability of expression, in her narrative mentions no single act of resistance or reprisal. It is inconceivable that such efforts should have been forgotten if they were made, or should fail of prominence in her narrative. * * * This court does not hold, with some, that, as matter of law, rape cannot be established by the uncorroborated testimony of the sufferer, but, in common with all courts, recognizes that, without such corroboration, her testimony must be most clear and convincing. Among the corroborating circumstances almost universally present in cases of actual rape are the *signs and marks of the struggle upon the clothing and persons of the participants, and the complaint by the sufferer at the earliest opportunity.* In the present case the former is absolutely wanting, for the one-inch rip in prosecutrix's underwear was not shown to be of a character or location significant of force or violence. Not a bruise or scratch on either was proved, and none existed on prosecutrix, for she was carefully

> examined by physicians. * * * When one pauses to reflect upon the terrific resistance which the determined woman should make, such a situation is well nigh incredible. * * * Nor is this thoughtfulness of the disarrangement of her clothing *consistent with the outraged woman's terror-stricken flight to friends to give the alarm and seek aid which is to be expected.*"

The case of *Brown v. State* is a standard case showing that the courts will not pave the way for every kind of blackmailing case through holding a defendant liable for criminal assault upon testimony which is either weak or unsupported. In each case which has been examined, including the many cases which have been reversed, the evidence has been vastly stronger *than in this present Vargas* case. It seems most clear that all thoroughly weak cases never reach the appellate courts; they are thrown out as a matter of course either by the lower court or by the committing magistrate in the same manner that United States Attorney Hatfield and United States Commissioner Krull dismissed the complaint made by the libelant against Jose Blanco.

But this entire body of law was ignored by the lower courts.

3. The duty to call out.

The courts lay great emphasis on the duty of a woman attacked to call out in case she is to later claim that rape was committed upon her. This is for the obvious reason that where assistance is to be had by calling out, a woman really resisting an attack would call for the assistance.

"Proof of the failure of the female to make any outcry tends to show that she consented to the intercourse, but if the transaction occurs at a place so remote from all human help that all outcry must be unavailing, it has been held that outcry need not be made, as the law does not require the doing of impossible or useless acts."

22 *R. C. L.* 1187;

State v. Cross, 12 Ia. 66;

Oleson v. State, 11 Neb. 276;

33 *Cyc.* 1489.

In *Jensen v. Lawrence,* 94 Wash. 148, the court instructed the jury:

"You are instructed that *if at the time of the alleged assault, or within a reasonable time thereafter, the plaintiff did not make an outcry, and that she did not do so as soon thereafter as opportunity offered itself,* unless she was prevented from making such outcry by fear and threats, *plaintiff would not be entitled to recover.*"

But here with probably 200 persons who would hear a scream the woman was discreetly silent—among other preposterous reasons because she did not know just who would come to her rescue, and also because the others made too much noise.

4. The duty to complain.

It must be clear to anyone who gives any thought to this case whatever, that if a woman was attacked in a stateroom by a steward she would not only scream when she saw that he intended some violence on her, but if she was attacked, with all the marks of a violent assault on her and in a state of uncontrollable excitement, she would at once rush from her stateroom and

relate to the vessel's officers how shamefully she had been treated. It would be as easy to picture a man who was held up and robbed on board a steamer never saying anything about it for months afterwards. No court would believe him. The fact of failure to complain as proof that a woman was not forcibly attacked has been brought out in various cases. In *State v. Kinney,* 44 Conn. 153 (26 Am. Rep. 438), the court said:

> "Why has the rule been adopted that in prosecution for rape, and for attempts to commit rape, the public prosecutor may show that the woman on whom the assault was made complained of it to her friends? *It is simply because such a course would be natural if the crime had been committed, but very unnatural if it had not been. But her natural impulses would prompt her to tell all the details of the transaction.*"

6 *A. L. R.,* page 1018, states:

> *"When a female is indecently assaulted or ravished, it is expected that she will follow the natural impulse of a virtuous woman under such circumstances, and make an outcry, and also complain of the wrong done her at the first reasonable opportunity."*

So in *People v. O'Sullivan,* 104 N. Y. 481 (58 Am. Rep. 530), the court said:

> "A disclosure in a case of rape has no legal value whatever unless it is the natural result of the horror and sense of wrong which would prompt every virtuous female to make outcry at the first suitable opportunity."

So in *Champagne v. Hamey,* 189 Mo. 709, the court said:

"An outcry and resistance are important elements of evidence, and a want of these circumstances, where they may reasonably be expected, go far to disprove the charge of rape * * * and a concealment of the injury, where there is an opportunity for early disclosure, may lead to a like inference. The evidence, as a whole, tends strongly to show that this is one of those cases where there has been a mutual gratification of desires and passions, and that *the notion of force on the part of the man, and want of consent on the part of the woman, is an afterthought. No disclosure was made by the woman until discovered to be pregnant,* and the first charge of force was made more than a year after the alleged outrage."

But the Vargas woman made no complaint whatever for five months after the alleged attack.

D.

THE RULE CONCERNING THE EFFECT OF FINDINGS OF LOWER COURTS MADE ON CONFLICTING EVIDENCE WHERE THE WITNESSES ARE EXAMINED IN OPEN COURT IS NOT APPLICABLE HERE. THE RULE HAS NOTHING TO DO WITH THE APPLICATION OF LAW TO THE FACTS. WHERE THERE ARE NO FINDINGS OR OPINION THE CASE ON APPEAL IS A CASE DE NOVO.

1. The Circuit Court of Appeals erred in assuming this to be a case where appellate courts refuse to review findings of lower courts based on conflicting facts.

The Circuit Court of Appeals rendered its opinion primarily upon the ground that the Vargas action belonged to the class of cases where appellate courts refuse to review findings of trial courts based on conflicting testimony. At another part of this brief we

shall discuss in detail the opinion of the Circuit Court of Appeals. The above reason assigned by that court makes it necessary to examine this phase of the law. Any careful consideration of the law shows that it is not applicable in this case.

From the earliest times the Federal Appellate Courts have recognized the principle that findings of fact made by trial courts should not lightly be disturbed. This salutary principle was applied by District Courts in the consideration of the findings of Commissioners as well as to the findings of courts themselves.

The Albany, 48 Fed. 565;
Parsons on Shipping and Admiralty, 215;
The Providence, 98 Fed. 133.

It was dependent on the principle that a Commissioner or a judge was to be presumed correct if, having actually heard two witnesses give conflicting testimony he specifically upheld the testimony of one witness. This being the basis of the rule it did not apply to cases where the testimony was taken by deposition.

Lazarus v. Barber, 136 Fed. 534.

The rule was applied in the early days when the District Courts were the only Federal Courts of first instance, and the Supreme Court the only Appellate Court.

The Marcellus, 1 Black 414, 17 L. Ed. 217.

It was applied when the Circuit Courts were created and given jurisdiction over the District Courts, and it was adopted when, in 1891, the present Circuit

Courts of Appeal were created and the appellate powers of the Circuit Courts abolished.

Literally hundreds of opinions have been written stating that

> "findings of fact by the District Court on conflicting evidence where the witnesses were examined in open court will not be reversed unless manifestly contrary to the evidence." (*American & Eng. Enc.*, Vol. I, p. 1359.)
>
> *The Sampson*, 4 Blatchf. 28;
>
> *Levy v. The Thomas Melville*, 37 Fed. 271;
>
> *The Captain Weber*, 89 Fed. 957.

As is the case with many general rules, the history and the meaning of this principle have sometimes been forgotten or misunderstood, and sometimes its language has been garbled. Like every such axiom, rightly applied it is productive of good law and sound justice, but carelessly applied or used to avoid the necessity of examining the facts of a case it can produce great injustice. If two witnesses appear before a District Court and give conflicting evidence a specific finding by the District Judge should be given great weight. But this does not mean that when a District Judge gives a decision in a case involving both facts and law, and does not state, or in any way indicate, the grounds he decides the case on, the upper court is to simply wash its hands of all responsibility by stating the case to have been one involving facts. That essentially is what the Circuit Court of Appeals did in the present case.

2. This case presented as much, if not more, of a question of law as of fact.

The statement of fact and the discussion of the law already made show that this appeal presents as much, if not more, of a question of law as of fact.

If what she said was entirely true, and if whenever she told conflicting tales the one most favorable to such a claim were selected, what then? In that event she would have no action for rape unless the fundamental law set out by the Supreme Court in *Mills v. United States (supra)*, and every other leading case on the subject, is to be uprooted and set aside. And this is primarily because she testified that she did not resist by effort or by scream, that she did not complain, but very obviously received at least his formal attentions for months afterwards.

But if this case presented that which it does not, a pure question of fact, what then? Is the rule regarding findings applicable? It is not. And it is not applicable because there were no findings or opinion and the very foundation of the rule disappears. This subject was covered in *The City of New York*, 54 Fed. 181.

There the court held that although the opinion of the trial judge in an admiralty case will not be disturbed on appeal as to questions of fact depending on the credibility of witnesses examined in his presence unless there is a decided preponderance of evidence the other way, his decision rendered without an opinion cannot be reviewed conformably with that rule, and on appeal therefrom, the Appellate Court will decide such questions of fact as best it may on

reading the record. In that case the Circuit Court of Appeals dealt with the question as to whether there is any application of the findings rule to a case where there is no opinion. The court decided in the negative and used the following language:

> "The learned district judge who heard this cause in the court below did not express any opinion in deciding it upon the facts or law of the case, and we are wholly uninformed of the reasons which led him to conclude that the libelants were entitled to recover. In controversies involving questions of negligence there is usually less difficulty in applying the rules of law to the facts than in ascertaining what the facts really are. In the present case the findings of the trial judge, in whose presence the important witnesses for the parties were examined, would have been most persuasive with this court in determining the facts, and probably would have been controlling, because the testimony is conflicting, and its weight and force depends upon the credit to be given the witnesses. The demeanor of the witnesses is a material and important part of the evidence, which cannot be sent up with the record; and, because this is so, the rule prevails in appeals in admiralty that the opinion of the trial judge will not be disturbed upon questions of fact, depending upon the credibility of witnesses who were examined in his presence, unless there is a decided preponderance of evidence the other way. Under the present circumstances, we must decide all questions of fact depending upon the credibility of witnesses as best we may upon reading the record.
>
> "It has been urged for the appellees that the decision of the district judge, without an opinion, is equivalent to the general verdict of a jury upon the issues of fact, and is necessarily a decision in favor of the libelants upon all litigated questions of fact necessary to a full recovery. We cannot for a moment assent to this proposi-

> tion. How can a reviewing court know what question of fact entered into the decision until it is informed what the judge decided as matter of law? We can hardly suppose in this case that the learned judge regarded the steamship as an insurer of the safety of the injured tug; but if he did, in the view which we take of the law, his decision could not involve any finding upon the most essential facts of the case."

It is realized that it is a difficult task for any Circuit Court of Appeals to consider a case absolutely *de novo*. However, it is a no more difficult task than it is for the litigant who has a case decided against him where he has no knowledge as to the real ground on which the case was decided. The litigant is far better off in a trial before a jury because there, at least, the judge must give instructions. Where the court simply decides a civil action with no opinion and no findings the court may be deciding it on a ground which is absolutely contrary to every conception of law. In spite of this fact, under the decision made by the Appellate Court in this case, regardless of the real ground for the decision of the judge, the Circuit Court of Appeals, if facts enter into the case at all, will affirm the judgment. The language by Wallace, C. J., in the *City of New York (supra)* states:

> "How can a reviewing court know what questions of fact entered into the decision until it is informed what the judge decided as matter of law."

In this particular case, if we are to judge from the rulings which the court made, the District Court thought the question of liability turned to a large

extent on whether or not this steward Blanco was the father of the child. As the assignments of error show, the court again and again admitted evidence of alleged statements by Blanco tending to show that he was interested in the welfare of the child. It is obvious that such evidence is not evidence which should properly result in the Panama Mail Steamship Company being held liable for rape. Yet this theory of the case, if we are to judge from the rulings referred to in the assignments of error, was exactly what was in the judge's mind.* How, then, is this Circuit Court of Appeals, or any appellate court, to state exactly the grounds on which this case was decided, and how can it reasonably refuse to examine the testimony taken in the court below?

E.

CONCLUSION.

No one who practices in the United States courts can view the present congestion of their calendars without some feeling of dismay. The vast number of cases, largely brought about through the increase of federal criminal statutes, has created a situation which is hard on litigants and their counsel, but more especially hard on the judiciary. This is particularly

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*As an instance of these rulings indicating the thought of the District Court:

"Mr. HUTTON. Did Blanco on that occasion say that he would get a divorce from his wife, that he had not any cause for divorce against her?

Mr. THACHER. I would like to object to that. Whatever that may be against Blanco certainly it is not relevant against the Panama Mail.

The COURT. Overruled." (Julian, 162.)

so in large seaport cities like San Francisco. Undoubtedly in time the condition will be remedied. It is only natural that all concerned in the welfare of the courts desire their labor to be minimized, provided the ends of justice are preserved. An obvious course for an over-worked court would be to cease to write opinions, and to do no more than enter judgments in civil cases. Any study of such a line of procedure shows, however, that this simple method of saving labor could not do otherwise than ultimately demoralize civil litigation and sap and destroy the prestige always enjoyed by the United States Federal Courts. If, in addition to a policy of merely entering judgments in the District Courts, the Circuit Courts of Appeal should affirm all cases in which there was any possibility of any question of fact having entered into the decision of the case, a worse condition could hardly be created.

Squalid and sordid as this present action is, it clearly shows what the results of such a course would be, if generally adopted in the Federal Courts. In the crush of litigation, if opinions and findings are abandoned, many cases will not receive any due consideration. With hundreds of actions almost floating through the courts, some will be decided without any real examination or weighing of the facts and law involved. This lack of due consideration will be even more likely where the decision is not rendered until long after trial. Then it may readily be decided upon the merest recollection, totally at variance with the true facts and law involved.

The present case may be taken as an example. We do not think that an identical case to this case, decided by the same judge, in the same court, would possibly have resulted in a judgment for the plaintiff ten years ago. The court then would have had time to examine the law and the facts and to write an opinion. The mere writing of a considered opinion would seemingly have destroyed all chances of success of the plaintiff, because it would have brought home to the judge deciding the case the true facts and what the law involved is. The only hope of the plaintiff in this action was that because of the general pressure of work upon the court due to a crowded docket the law involved and the details of the facts would not be considered, and that if decided without due consideration sympathy for the position of an unmarried mother would receive undue weight. Had an opinion been written by the court it would presumably have recognized that the woman had absolute protection at hand, and that one scream would probably have been heard by at least a hundred persons scattered around on the vessel. It would have recognized the complete lack of concern shown by the woman, the going to breakfast and the failure to complain to anyone. It would have recognized the friendly relations of Blanco and the Vargas family, the woman's introduction of Blanco to her brother, the presumed courtship, the various gifts and the ultimate discovery that Blanco was married and that Miss Vargas was in a delicate condition. It would have recognized the obvious perjury of the Vargas woman in testifying on one occasion that she gave a ring to Blanco to keep for her and her later testi-

mony that he stole it. It could not well have ignored the testimony of the absolutely independent witness, Angela Villavicencio, that she was in the stateroom, the roommate of Miss Vargas, and that no such attack ever occurred. The writing of such an opinion would have been a guarantee against the court entering a judgment without a careful weighing of the evidence and the law involved. Had such evidence and law been considered it seems incredible that a judgment would have been given for the plaintiff. This is for the reason that such an opinion, recognizing the evidence above cited, would not only be at total variance with *Mills v. United States (supra)*, and all other leading cases on the subject, but would have been so contrary to the obvious truth that no court would ever give it.

What has been said of the District Court applies also to the Circuit Court of Appeals. The same type of congestion which was undoubtedly responsible for the decision in this case by the District Court was also responsible for the decision in the Circuit Court of Appeals. We have already discussed the reasoning of the opinion of that court, and its conclusion taken from the mere type of case, that the appeal involved a question of fact and that therefore the upper court would practically as of course affirm the decree of the lower court. Had the upper court found time to examine the record it would have seen, as we have pointed out, that not only was the question involved one very largely of law, but also that the rule concerning presumed correctness of findings did not apply because there were no findings. It woud have

recognized that even so far as the facts were concerned the situation was dealt with in the *City of New York,* 54 Fed. 181, and that the upper court had before it a case where it was obligated in justice to the litigant to consider all the testimony and decide the matter as a case *de novo.*

It was with hesitancy that we petitioned the United States Supreme Court to grant a writ of certiorari in this action. We felt that a case of such an unsavory type, involving a squalid affair between a Filipino and a Central American native was not one with which the highest court should be troubled. At the same time we saw our client, the Panama Mail Steamship Company, held liable for a judgment arising from a cause for which it was in no way responsible, and we saw this gross injustice, obviously caused by the evident failure of the lower courts to examine with care the facts and the law involved. In some court, original or appellate, the Panama Mail Steamship Company seemed entitled to such an examination. And unless the whole law on the subject is to be changed and the obvious character of this brazen attempt to collect is to be entirely lost sight of, such an examination, if had in any court, would, in our opinion, have blasted the hopes of the plaintiff for a judgment. But we had in mind more than this one particular case. Here is a striking proof of what injustice will result if lower courts write no opinions and if Appellate Courts, by a distortion and misapplication of the findings of fact rule, affirm all cases in which some party may have raised a question of fact. To us this case presents

a favorable opportunity for reiterating the exact nature of the finding of fact rule and emphasizing its limitations, and that it does not apply where the District Courts render no opinion and make no findings, and that in no event does it affect the obligation of the upper court to examine all questions of law involved in the record. If the District Courts are to write no opinions and the Circuit Courts are to take the same view of appeals which the Appellate Court took in the present case, a condition of untold seriousness will arise in the Federal Courts because litigants before such courts will only be receiving a small part of the consideration to which they have always felt entitled. And should such a practice prevail such an obvious miscarriage of justice as is brought home by a study of the record in the present case may very well be the rule rather than the exception in future litigation.

We respectfully submit that the judgment in the present action should be reversed.

Dated, San Francisco,
March 15, 1930.

Respectfully submitted,

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